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NTSB Order No. EA-5165

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 21st day of June, 2005

MARION C. BLAKEY, Administrator, Federal Aviation Administration, Complainant, v. GREGORY CHARLES TARASCIO, RYAN IANNELLO BECK, NICHOLAS PAUL TARASCIO, ANTHONY MICHAEL TARASCIO, Respondents.	)	Dockets SE-17389 SE-17390 SE-17391 SE-17392

OPINION AND ORDER

The Administrator has appealed from Administrative Law Judge Patrick G. Geraghty's May 24, 2005, dismissal[1] of four emergency orders suspending respondents' mechanic certificates with airframe and powerplant ratings (hereinafter "mechanic

[1] An excerpt from the hearing transcript containing the law judge's grant of the motion to dismiss, as well as the argument and discussion pertaining to the motion, is attached. A copy of the law judge's subsequent written order documenting the dismissal, dated May 26, 2005, is also attached.

certificates") until such time as they successfully demonstrate to the Administrator that they possessed the civil experience requirements contained in 14 C.F.R. § 65.77[2] at the time of their applications, and successfully accomplish a reexamination of their qualifications. For the reasons discussed below, the appeal is granted and the case is remanded for further proceedings.

Background

The Administrator's May 11, 2005, emergency orders alleged that she was unable to verify that respondents (each of whom had submitted applications for, and been issued, mechanic certificates within the previous eight months) had been eligible to apply for mechanic certificates at the time of their respective applications. Specifically, in each of the orders the Administrator alleged that the 1etters each respondent had submitted certifying that they had received the required training in accordance with section 65.77 to be eligible to apply for a mechanic certificate, listed experience that appeared to have been obtained from a Part 135 air carrier that was revoked on an

[2] Section 65.77 sets forth the following experience requirements for applicants for mechanic certificates with airframe and powerplant ratings: "Each applicant for a mechanic certificate or rating must present either an appropriate graduation certificate or certificate of completion from a certificated aviation maintenance technician school or documentary evidence, satisfactory to the Administrator, of … [a]t least 30 months of practical experience concurrently performing the duties appropriate to both the airframe and powerplant ratings."

emergency basis for failure to properly maintain aircraft.[3] The orders stated that, as a result of this and "other considerations," the Administrator had deposed respondents regarding details of their experience in order to confirm that they did possess the required civil experience to be eligible to apply for a mechanic certificate. The orders further alleged that at the depositions, in response to many of the questions on this subject, respondents refused to answer, invoking their Fifth Amendment privilege against self-incrimination and, as a result, the Administrator determined that there was a reasonable basis to question whether respondents possessed the qualifications necessary to hold a mechanic certificate.

At the hearing, the Administrator presented evidence that raised significant questions as to the viability of the claims made by each of the respondents regarding their required 30 months of practical experience. For example, one respondent was apparently a full-time high school student and then college student, and also obtained a pilot certificate and several ratings during the same period of time he allegedly received his practical mechanic experience. Another attended college and earned a degree in electrical engineering, as well as pursued a masters degree, and had a full-time job as an engineer with a non-aviation company, in addition to performing non-maintenance related work for Air East, all during the period of time he

[3] The Board affirmed the emergency revocation of the carrier, Air East Management, Limited, on May 5, 2004. See Administrator v. Air East, NTSB Order No. EA-5089 (2004).

allegedly received his practical mechanical experience.[4] A third respondent apparently began working as a mechanic at age 13.

At the conclusion of the Administrator's case, respondents moved to dismiss the complaints, arguing that the Administrator did not have a reasonable basis to question their qualifications, and that they did not refuse a reexamination request. The law judge stated that he could infer from the Administrator's case that she might have had questions, and stated that he assumed, "everything that's been said is factual and that, arguably, it's a reasonable basis." However, he granted the motion to dismiss because, in his judgment, no reexamination request had been made or refused. The law judge made clear, however, that, "that doesn't mean that you [the Administrator] can't start over." We disagree with the law judge's subsequent characterization of the dismissal, in his May 26 written order, as one "for failure of proof." The issue upon which he based his dismissal appears to us to be a procedural issue, rather than one of proof of the merits. As the law judge recognized at the hearing, the Administrator's burden of proof in reexamination cases is very low; the Administrator only needs to show that the basis for the reexamination request is reasonable. (Transcript (Tr.) 7-8.)

[4] Each respondent claimed that they had accumulated their 30 months of experience over a period of several years ranging from 5.5 to 8.5 years. The Administrator apparently permits the required 30 months of experience to be accumulated over a longer period of time. However, the FAA's questions in this case appeared to be aimed at determining whether respondents actually gained the equivalent of 30 months of practical experience during those years.

On appeal, the Administrator asserts that there was a reasonable basis for the reexamination request. Regarding the need for a formal letter of reexamination, the Administrator argues that respondents were provided with adequate notice of what was at issue through the subpoenas for respondents' testimony and records that preceded the emergency orders of suspension. She commented in her brief, "if the respondents would not answer the Administrator's questions and requests for documents regarding their qualifications under the compulsion of subpoena, it is unlikely that they would be impressed with a simple letter." The Administrator argued that the FAA's statute authorizes the issuance of orders of suspension after conducting "a reinspection, reexamination, or other investigation" (49 U.S.C. 44709(b)), but does not dictate the manner in which an investigation must be conducted.

In their reply brief, respondents assert that the Administrator did not give them notice that they were being requested to submit to a reexamination or an opportunity to submit to such a reexamination, and the respondents did not refuse to submit to a reexamination. Respondents argue that the reason they refused to answer questions at the depositions was because they believed the Administrator might be pursuing a falsification or fraud case against them, and they feared the possibility of criminal prosecution. Respondent's counsel stated at the hearing that, "[i]f they had known at the time that the deposition subpoenas were for the purpose of reexamination … they

would not have refused because they would have known going into it what the ramifications would have been and they would have gladly provided information." (Tr. 171.)

Discussion

Respondents' argument that they were not given notice and an opportunity to comply with the Administrator's reexamination request before issuance of the emergency orders is essentially a due process argument. However, in emergency cases, the opportunity to be heard comes after the issuance of the order[5]; the expedited nature of the proceedings are intended to compensate for that fact. Although the Administrator's appeal brief acknowledges that, "it is the Administrator's general policy to issue re-examination letters," she also states that in some cases immediate action is appropriate. By definition, an emergency proceeding (i.e., one in which the order is immediately effective) is one in which the certificate holder is not entitled

[5] The requirement in 49 U.S.C. § 44709(c) to provide certificate holders with an opportunity, before issuance of the order, to answer the charges and be heard as to why the certificate should not be amended, modified, suspended or revoked, applies "except in an emergency." Under 49 U.S.C. § 46105(c), when, "the Administrator is of the opinion that an emergency exists related to safety in air commerce and requires immediate action, the Administrator, on the initiative of the Administrator or on complaint, may prescribe regulations and issue orders immediately to meet the emergency, with or without notice and without regard to this part . . ." (Emphasis added). See, e.g., Administrator v. Stern, 2 NTSB 1240 (1974) (the Administrator is not required to give notice or an opportunity to answer and be heard prior to the issuance of an emergency order), aff'd Stern v. Butterfield, 529 F.2d 407 (5th Cir. 1976); Cowell v. NTSB, 612 F. 2d 505 (10th Cir. 1980).

to advance notice and an opportunity to respond.[6]

In Air East v. NTSB, 512 F.2d 1227 (3rd Cir. 1975),[7] the court rejected an argument that issuance of emergency orders without a prior hearing was a denial of due process, noting that the statutory procedure does afford a prompt adjudication after issuance of the orders. However, the court in Air East also found that the recipients of the emergency orders had, "to some extent … been given an opportunity to present explanatory material before the [emergency] revocations occurred." 512 F.2d at 1232. The court in Air East noted that, while the recipients of the orders did not know all that was transpiring during the "somewhat covert" investigation that preceded issuance of the orders, they certainly were aware that a much broader investigation than the one originally triggered by the accident was underway, having been deposed and having received subpoenas for production of records.

Similarly, we think that the respondents in this case were sufficiently put on notice, by way of the subpoenas and depositions, that the Administrator was examining the basis for their qualifications. The subpoenas were captioned in such a way as to make it clear that the Administrator was seeking information about their recent applications for mechanic

[6] We note that respondents in this case could have, but did not, challenge the emergency nature of the orders. See 14 C.F.R. 821.54.

[7] The carrier named in this case is unrelated to the carrier by the same name mentioned in footnote 3.

certification,[8] and they required production of any and all documents relating to:

> Your [date] certification to the FAA that you met the requirements of 14 C.F.R. §65.77 and/or possessed the civil experience requirements to be eligible to apply for an airframe and powerplant certificate. This includes any documents that you use or rely on to demonstrate and/or prove that you met the experience requirements of 14 C.F.R. §65.77 when you applied for an airframe and powerplant certificate.

The subpoenas were issued on April 6, 2005, and the depositions were scheduled for April 14th. Accordingly, respondents had eight days notice, which should have been sufficient time to prepare for the depositions and collect the requested documents. However, no additional records were produced in response to the subpoenas, and no meaningful answers were provided to most of the questions asked at the deposition.

Respondents claim in their brief that they are, "ready, willing, and able to undergo re-examination," but contend the Administrator never offered them an opportunity prior to issuing the emergency orders. (Respondent's brief at 18.) Respondents conspicuously do not address the obvious opportunity that existed after issuance of the orders. Assuming, for the sake of argument, that the subpoenas asking for respondents' testimony and records did not adequately notify respondents that the Administrator was reexamining the basis for the experience they claimed pursuant to section 65.77, any remaining doubt would have

[8] The captions read: "In the Matter of Airman certification and/or rating applications, FAA Form 8610-2, submitted during the period of August 2004 to the present to the Farmingdale FSDO."

been removed when they received the emergency orders of suspension. Respondents' counsel claimed at the hearing that they would gladly have provided the requested information validating their experience if only they had known that the Administrator's purpose was to reexamine their qualifications. It would logically follow that, after the Administrator's purpose became clear to them, they should have offered to present the information.

If respondents did not meet the experience requirements of section 65.77, then these certificates could be viewed as void ab initio. Further, if the requirements were not met or properly supported, then the Administrator might legitimately question the truthfulness of the information provided by each of the respondents with their applications. In this regard, we do not share respondents' apparent sense of injustice at the possibility that the Administrator may also have been looking into the possibility of falsification charges against respondents as she sought additional information to validate their qualifications. While respondents were entitled to claim the Fifth Amendment privilege against self-incrimination and refuse to answer the Administrator's questions if they feared criminal prosecution, by claiming this privilege, they did not deprive the FAA of its right to suspend their certificates pending resolution of legitimate questions as to the validity of their qualifications.

Respondents argue in their brief that a remand is unnecessary and would serve no useful purpose. They point out

that they are not required to present a defense, thus intimating that they may elect not to present a defense in the event of a remand. If they elect not to present a defense, we would expect that the law judge will declare the record complete and make his decision on the existing record.

Finally, we are constrained to comment on the unfortunate consequences flowing from the procedural posture of the case and the necessity for a remand. The 60-day statutory deadline for our final disposition of emergency cases requires the agency to handle all phases of these cases, including appeals to the Board, with extreme dispatch.[9] Within these constraints, there likely is not sufficient time for a remand and further appeal back to the Board and issuance of a final decision before the statutory deadline runs. Therefore, in the future, we urge our law judges to refrain from terminating an emergency hearing before a full record has been developed and, instead, complete the hearing. This will not only help ensure that the agency maintains its record of adhering to the emergency time limits but would also avoid the costs and inconvenience for the parties, witnesses, court reporter, and law judge to travel again to the hearing.

[9] Failure to meet this 60-day statutory deadline does not divest the Board of jurisdiction, but it may divest the FAA of the authority to continue its designation of the case as an emergency. Gallagher v. NTSB, 953 F.2d 1214, 1221 (10th Cir. 1992) ("Congress obviously intended by its use of such imperative language that the NTSB's failure to comply with the mandate would have some consequence").

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted;

2. These consolidated cases are remanded to the law judge for completion of the evidentiary record, and a ruling on the merits of the emergency orders of suspension; and

3. The proceedings on remand should be completed on an expedited basis in light of the Board's statutory responsibility to complete its disposition of this case no later than 60 days after the date on which respondent's appeal was filed (that is, by July 11, 2005).

ROSENKER, Acting Chairman, and ENGLEMAN CONNERS and HEALING, Members of the Board, concurred in the above opinion and order. Member ENGLEMAN CONNERS submitted the following concurring statement, in which Acting Chairman ROSENKER joined; and Member HEALING submitted the following concurring statement. HERSMAN, Member, did not concur, and submitted the following dissenting statement.

Concurring Statement of Member Engleman Conners

I agree with the sentiment of Member Hersman expressed in her dissent that:

> The merits of the case as presented are troubling and certainly action should be taken to determine the facts of the case. The Administrator appears to be justified in bringing a re-examination case against all four respondents; indeed she may choose to pursue a falsification or fraud case against the respondents.

Indeed, a remand now to complete the hearing would provide the evidentiary record to decide fairly and fully the merits of the case. This is the underlying foundation of the goals and intent of the American judicial system.

However, instead of moving to the merits, to insist that, "the Administrator must first comply with the FAA's own procedures and send a formal letter of investigation informing the respondents of the violations for which they are being charged," is inappropriate. If this were required, the FAA would have to go

through the exercise of formally advising the respondents by letter of something respondents have formally and officially known for more than a month and had spent the better part of a day litigating in addition to duplicating much of what has already occurred, at additional delay and cost to the taxpayer.

I strongly disagree with this approach. It is a triumph of form over substantive law and common sense. Obviously, the subpoenas for testimony and production of records and questions posed at the deposition put respondents on notice that the Administrator was calling into question the adequacy of their experience when they applied for certificates. And no one can argue that the respondents remained ignorant of the nature of the reexamination of their qualifications after the Administrator served her emergency orders on May 11, 2005. So what is now to be gained by a step backwards? Any such action would eviscerate the crucial, Congressionally-sanctioned emergency authority entrusted to the Administrator.[10] In sum, such a position is contrary to law,[11] and Board[12] and court[13] precedent; it is also contrary to transportation safety.[14]

Concurring statement of Member Healing

I agree that this case should be remanded to the law judge for completion of the record and a ruling on the merits. However, I remain somewhat uncomfortable with the FAA's procedural handling of this case. First, it appears that the FAA

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[10] Of course, if respondents believed that they had a valid basis to set aside the emergency nature of the Administrator's order, one would have expected them to invoke our review of the Administrator's determination of an emergency. Having failed to do so suggests a recognition on their part that the emergency declaration was not assailable because of an alleged lack of notice of the reexamination requests.

[11] 49 U.S.C. § 46105(c).

[12] *See, e.g., Administrator v. Stern*, 2 NTSB 1240 (1974) (the Administrator is not required to give notice or an opportunity to answer and be heard prior to the issuance of an emergency order), aff'd *Stern v. Butterfield*, 529 F.2d 407 (5th Cir. 1976).

[13] *See, e.g., Stern, supra*, and *Cowell v. NTSB*, 612 F. 2d 505 (10th Cir. 1980).

[14] By law, the Administrator's emergency authority is predicated on imminent threats to safety in air commerce, and it is beyond presumptuous for the Board to impose a notice requirement on the Administrator's emergency authority. Only the Congress can make such a change.

did not follow its normal procedures for initiating re-examination requests, in that no letters were issued explicitly requesting the respondents to undergo re-examination. I realize that the FAA may have assumed that the subpoenas would serve the same purpose. However, if the FAA had issued a standard re-examination letter, it could have avoided any confusion on the part of the respondents as to the real focus of the FAA's investigation, and it could also have simplified the issues in this appeal and perhaps avoided the appeal altogether.

Second, I question why the FAA waited so long to verify the accuracy of the information contained in the letters certifying the respondents' 30 months of practical experience. It is apparently not the FAA's normal practice to seek additional evidence or documentation when reviewing applications for mechanic certification. But perhaps the FAA should consider changing its practice and looking more deeply into what proof exists of the claimed experience at the time it initially reviews and approves the application. Along these lines, I am also troubled that Inspector DiPaulo (the investigating inspector in this case) did not check with the other FAA inspectors who initially reviewed and approved of the applications and accompanying letters of certification, to ask them for their rationale in approving the applications.

Finally, I find it disquieting that the FAA did not emphasize its emergency authority to either the law judge or to the full Board on appeal. Although that authority clearly permits the FAA to take emergency action without issuing prior notice, the FAA did not clarify this point when it had the opportunity to do so. If this argument had been clearly made at either juncture, it would have assisted in the agency's adjudication of this case.

Dissenting Statement of Member Hersman

I would deny the Administrator's appeal to reverse the law judge's dismissal of FAA's emergency order for procedural error and remand the case to the law judge for disposition on the merits. The Board frequently cites respondents' failure to comply with proper procedures when dismissing their appeals of the Administrator's decisions. For example, timely filing is a procedural requirement in which respondents often are disadvantaged because of their unfamiliarity with the procedures and because their employment requires them to be away from home (and their mailboxes) for long periods of time. Nevertheless, the Board expects these respondents to meet all procedural deadlines, and it dismisses their appeals when they fail to comply.

This appeal marks the second time in one month that the

Administrator has asked the Board to overlook the FAA's procedural errors and overturn an unfavorable law judge decision, a trend that I find unsettling. The Administrator should be held to the same standards to which she and the Board hold respondents in abiding by established appeal procedures.

The merits of the case as presented are troubling and certainly action should be taken to determine the facts of the case. The Administrator appears to be justified in bringing a re-examination case against all four respondents; indeed she may choose to pursue a falsification or fraud case against the respondents. However, the Administrator must first comply with the FAA's own procedures and send a formal letter of investigation informing the respondents of the violations for which they are being charged.

The intent of the procedures is to ensure that the appeals process remains impartial and consistent. It is therefore imperative that all parties to an appeal be expected to follow the procedures with the same diligence. Thus, I am not inclined to overturn any decision rendered by a law judge when they find fault on procedural grounds with the FAA's handling of a case. I find that the law judge in this case acted properly and consistent with precedence.